



7536-01

## **NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES**

### **National Endowment for the Humanities**

45 CFR Part 1171

RIN 3136-AA32

Public Access to NEH Records under the Freedom of Information Act

**AGENCY:** National Endowment for the Humanities.

**ACTION:** Final rule.

**SUMMARY:** The National Endowment for the Humanities (NEH) is unilaterally rescinding its joint Freedom of Information Act (FOIA) regulations with the National Endowment for the Arts (NEA) and the Institute of Museum and Library Services (IMLS), and issuing its own FOIA regulations. This final rule provides the NEH's procedures for disclosure of its records, as required by the FOIA, 5 U.S.C. 552, as amended. These regulations also provide the procedures for disclosing records of the Federal Council on the Arts and the Humanities (FCAH), an agency for which NEH provides legal counsel.

**DATES:** The final rule will be effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Mara Campbell, Office of the General Counsel, National Endowment for the Humanities, at 202-606-8322, or [mcampbell@neh.gov](mailto:mcampbell@neh.gov).

**SUPPLEMENTARY INFORMATION:**

The NEH along with the NEA, the IMLS, and the FCAH make up the National Foundation on the Arts and Humanities (Foundation). The Foundation was established by the National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. 951 et seq. The NEH along with the NEA and the former Institute of Museum Services (now, the IMLS) last issued joint FOIA regulations, 45 CFR part 1100, on December 21, 1987. Each agency has decided to issue its own separate FOIA regulations. The NEH's regulations incorporate changes brought by the amendments to the FOIA under the OPEN Government Act of 2007, Public Law 110-175, 121 Stat. 2524. These regulations also include changes to the NEH's fee schedule for processing FOIA requests, provide procedures under which the agency will process requests for the NEH Office of the Inspector General records, and reflect developments in FOIA case law.

These regulations were published for public comment in the Federal Register on February 11, 2013 (78 FR 9654), the comment period ended on April 12, 2013, and three commenters provided input. The NEH carefully considered these comments and has made some changes to the final rule in response. The comments and NEH's responses are discussed below.

The first commenter was a federal agency and it offered suggestions to clarify the rule. First, the commenter suggested adding language clarifying the intersection between FOIA and the Privacy Act. We agree and in response have added language into section 1171.2.

The commenter applauded the NEH for incorporating a foreseeable harm standard in its policy and for stating it will make discretionary disclosures of records and information. The commenter was also pleased to see a listing of the types of information

available on the agency's website as well as our definition of "submitter in section 1171.9.

In response to section 1171.5, addressing requests for records, the commenter suggested changing "must" to "should" in subpart (a)(4). We agree and have updated this section.

In section 1171.6, the commenter suggested that referrals include information on the portion of the request referred and the receiving agency's FOIA contact information. We agree and have added this language into subsection (d).

In section 1171.7, the commenter suggested that NEH's acknowledgement letters provide requesters with an individualized tracking number and a brief description of the request if it takes NEH longer than twenty working days to respond. After considering the suggestion, we have decided to retain the proposed language. We believe section 1171.8(a) adequately addresses the commenter's concern (to assign a tracking number to requests taking twenty days), because it already requires NEH to provide an individual tracking number for requests that will take longer than ten days. With respect to the suggestion to include a brief description, NEH acknowledgement letters typically provide requesters with a verbatim description of the requested records and the contact information for the FOIA office. Thus, a requester can always contact the FOIA office if he/she needs further clarification.

In section 1171.8, the commenter suggested that when marking on released documents, NEH indicate the precise amount of information deleted, if technically feasible. After considering the suggestion, NEH has decided to retain the proposed language. As a matter of practice, NEH routinely indicates the amount of information

redacted, if doing so is feasible and does not create an undue burden on FOIA staff and the efficiency of the agency's FOIA program.

The commenter also had comments on section 1171.10, concerning administrative appeals. The commenter's first suggestion was to change "must" to "should" in section 1171.10(a), particularly in light of section 1171.8(a) which does not require NEH to assign tracking numbers to all requests. In order to clarify this section we have modified section 117.10(a) in part. The commenter also suggested the rule provide information on the National Archives and Records Administration, Office of Government Information Services. We agree and have updated section 1171.10(b).

The commenter provided various comments on section 1171.11, addressing fees. First the commenter suggested that NEH provide requesters with an estimate amount of fees, including a breakdown of fees for search, review and/or duplication. While we appreciate the commenter's suggestion, we have decided to keep the proposed language as it follows best practice language used in other agency FOIA regulations. The commenter also suggested that NEH state it would not charge a requester the operator/programmer salary while a computer is running a query or automatic search in response to a request. In order to clarify this section we have modified section 1171.11(c)(1)(ii) in part. The commenter further suggested that NEH define "fee waiver" and recommended striking the word "attenuated" from section 1171.11(f)(2)(i) in the "interest of plain language." After considering the suggestion, we have decided to retain the proposed language. The commenter applauded NEH for including a provision that non-commercial FOIA requesters are entitled to two hours of search time and 100 pages of duplication free of charge in 1171.11(d)(1). In light of this section, the commenter

suggested revising section 1171.11(g)(2) for consistency. We agree and have modified this section accordingly.

The commenter recommended that NEH release all documents without any charge or at reduced charge if the information is in the public interest. NEH regularly releases information that would likely be of public interest on its website and notes that the majority of its FOIA requests come from educational institutions that are not charged for the information received. NEH will continue to assess what information it may proactively release while complying with FOIA.

Finally, the commenter suggested that the rule include a section on the preservation of records and records management. We agree and have added a new section.

The second commenter was a public interest research center. The comments offered improvements to the rule. Some of the commenter's suggestions mirrored other comments, many of which were accepted.

The commenter had various suggestions regarding document disclosure. The commenter suggested that NEH post all released records online and that it consider joining the multi-agency FOIAonline portal. While NEH appreciates the suggestion, posting all released records would be impractical and a heavy administrative burden for the small team that administers the NEH FOIA program. Additionally, NEH routinely proactively releases documents that are likely to have a significant public interest, and posts these documents in its electronic FOIA Library. Regarding the portal, NEH may assess joining in the future. The commenter further suggested that the rule explicitly state that NEH will proactively identify records of public interest, post these records

online and establish categories of records that can be disclosed regularly and posted online. We agree and have modified section 1171.4(c) in part. The commenter also suggested that NEH publish indexes of disclosed records online. NEH appreciates the comment but has previously determined that publication and distribution of these indexes is impracticable, and in any event NEH routinely releases these indexes under FOIA upon request. The commenter also suggested, in the case of FOIA referrals, the rule provide the FOIA contact at the receiving agency. We agree and have modified section 1171.6(d).

The commenter had a number of suggestions regarding notifying requesters of dispute resolution services. The commenter suggested that all acknowledgment letters include the FOIA Public Liaison's contact information and that the rule include a new "Dispute Resolution" section to provide instructions on how to access the Public Liaison. Although we appreciate both comments, we believe that by posting the Public Liaison's contact information on the NEH's website and in its annual FOIA documents the public is sufficiently informed about how to contact this individual.

The commenter also had comments regarding the Office of Government Information Services (OGIS). Specifically, the commenter suggested that (1) all NEH decision and appeal letters include information on the role of OGIS and its contact information (2) the rule include a new "Dispute Resolution" section that describes how requesters may access OGIS services, and (3) the NEH website include information on OGIS. With respect to the first suggestion, while we agree that appeal letters would be improved by providing information on OGIS, we do not believe this information is appropriate in decision letters. Regarding the second suggestion, we do not believe it is

necessary to create a new “Dispute Resolution” section of the rule, particularly now that the rule will include the contact information for OGIS. Regarding the third suggestion, we agree and will add information on OGIS to the NEH FOIA website.

The commenter also suggested revising the rule to allow requesters to submit administrative appeals by e-mail and fax. We agree and have revised section 1171.10(a). The commenter further suggested allowing a minimum of sixty days for administrative appeal submissions. We agree more time could be helpful and have increased the timeframe to thirty days. The commenter also recommended increasing the threshold of the minimum fee charge. We agree and have increased the threshold from \$14 to \$25. Finally, the commenter suggested that section 1171.11 include information on possible fee waivers if NEH fails to comply with statutory time limits. We agree and have added new language to this section.

The third commenter was a private citizen and provided comments to improve the rule. First, the commenter thought section 1171.7(d)(2) was generally duplicative of section 1171.11(k). Although we appreciate the commenter’s perspective, NEH believes both sections are useful. One section serves the purpose of informing the public that NEH may aggregate requests in certain circumstances, and the other is about fees related to aggregated requests. The commenter also suggested the regulation include information on possible fee waivers if NEH fails to comply with statutory time limits. As noted above, we agree and have added new language to 1171.11(d). Finally, the commenter believed that portions of section 1171.11(c)(1)(ii) reflected an outdated and antiquated practice. We agree and have modified this section.

NEH will comply with all applicable laws in its FOIA administration, including Presidential memoranda and Attorney General guidance. We thank all commenters for their thoughtful input.

#### E.O. 12866, Regulatory Review

This rule is not a “significant regulatory action” under Executive Order 12866 and therefore is not subject to Office of Management and Budget (OMB) review.

#### Regulatory Flexibility Act

The NEH Chairman, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has certified that this rule will not have a significant economic impact on a substantial number of small entities. Under the FOIA, NEH may recover only the direct costs of searching for, reviewing, and duplicating the records that agencies process for requesters. NEH’s fee schedules for such costs are consistent with OMB guidelines on FOIA fees, and provide criteria by which requesters may receive a fee waiver or reduction of fees. Furthermore, the rule will only affect persons and organizations who file FOIA requests with NEH, which receives relatively few requests each year (generally fewer than fifty (50) per year) in comparison to other Federal departments and agencies.

#### Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, Pub. L. 104-4, the rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 million or more in any one year, and it will not significantly or uniquely affect small governments.

#### Small Business Regulatory Enforcement Fairness Act of 1996



This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804, as amended. This rule will not result in an annual effect on the economy of \$100,000,000 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### Paperwork Reduction Act

The NEH has determined that the Paperwork Reduction Act, 44 U.S.C. 3501 et seq., does not apply to the rule because the rule does not contain information collection requirements that require OMB approval.

#### List of Subjects in 45 CFR Part 1171

Administrative practice and procedure, Freedom of Information.

For the reasons stated in the preamble, the National Endowment for the Humanities amends 45 CFR chapter XI, subchapter D, to add part 1171 as follows:

#### PART 1171 -- PUBLIC ACCESS TO NEH RECORDS UNDER THE FREEDOM OF INFORMATION ACT

##### Sec.

- 1171.1 About the National Endowment for the Humanities.
- 1171.2 General provisions.
- 1171.3 Information policy.
- 1171.4 Public availability of records.
- 1171.5 Requests for records.
- 1171.6 Responsibilities for processing and responding to requests.
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- 1171.8 Responses to requests.
- 1171.9 Confidential commercial information.
- 1171.10 Administrative appeals.
- 1171.11 Fees.
- 1171.12 Preservation of records.
- 1171.13 Other rights and services.

Authority: 5 U.S.C. 552, 31 U.S.C. 3717, E.O. 12600.

§ 1171.1 About the National Endowment for the Humanities.

The National Endowment for the Humanities (NEH) was established by the National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. 951 et seq., and is an independent grant-making agency of the United States government dedicated to supporting research, education, preservation, and public programs in the humanities. The NEH is directed by a Chairman and has an advisory council composed of twenty-six presidentially-appointed and Senate-confirmed members.

§ 1171.2 General provisions.

This part contains the regulations the NEH follows in processing requests for NEH records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended. The NEH also follows these regulations to process all FOIA requests made to the Federal Council on the Arts and the Humanities (FCAH), an organization established by the National Foundation on the Arts and Humanities Act of 1965 for which the NEH provides legal counsel. These regulations should be read together with the FOIA and OMB's Free Guidelines, which provides additional information about access to NEH and FCAH records. FOIA applies to requests for records concerning the general activities of the government and of the NEH in particular. When individuals seek records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, NEH processes those requests under both NEH's Privacy regulations at part 1115 of this chapter, and this part. Although requests are considered either FOIA requests or Privacy Act requests, agencies process requests in accordance with both laws, which provides the greatest degree of lawful access while safeguarding an individual's personal privacy.

§ 1171.3 Information policy.

The NEH may provide information the agency routinely makes available to the public through its regular activities (for example, program announcements and solicitations, press releases, and summaries of awarded grant applications) without following this part. As a matter of policy, the NEH makes discretionary disclosures of records or information otherwise exempt under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption. This policy, however, does not create any right enforceable in court.

§ 1171.4 Public availability of records.

(a) In accordance with 5 U.S.C. 552(a)(2), the NEH will make the following records available for public inspection and copying (unless they are published and copies are offered for sale) without a FOIA request:

(1) Final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases,

(2) Statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register,

(3) Administrative staff manuals and instructions to staff that affect a member of the public,

(4) Copies of all records, regardless of format, which have been released to any person under 5 U.S.C. 552(a)(3) and which, because of the nature of their subject matter, the NEH determines have become or are likely to become the subject of subsequent requests for substantially the same records, and

(5) A general index of the records referred to in paragraph (b) of this section.

(b) The NEH will also maintain and make available for public inspection and copying current indexes as required by 5 U.S.C. 552(a)(2) of the FOIA. However, since the NEH has determined that publication and distribution of these indexes is unnecessary and impracticable, the NEH will provide these indexes upon request at a cost not to exceed the direct cost of the duplication.

(c) NEH proactively identifies records of interest to the public, such as past awards, press releases, grant guidelines, and grant terms and conditions, and makes these records available on the NEH's website at [www.neh.gov](http://www.neh.gov). In addition, copies of the NEH's policy statements, information about the NEH's FOIA program, sample grant narratives, and other frequently requested records are available in the NEH's Electronic Library.

§ 1171.5 Requests for records.

(a) How to make a request. Your FOIA request need not be in any particular format, but it must be in writing, include your full name, mailing address, daytime telephone number. If you choose to submit your request on the NEH website, the request must also include your e-mail address. Your request should be clearly identified as a FOIA request in both the text of the request and on the envelope (or on the facsimile or in the subject heading of an e-mail message) and must describe the requested records in enough detail to enable NEH staff to locate them with a reasonable amount of effort. Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter of the record. The NEH has no obligation to answer questions posed as FOIA requests or to create records to satisfy a FOIA request.

(b) Agreement to pay fees. If you make a FOIA request, the NEH will consider it an agreement by you to pay all applicable fees charged under this part, subject to the fee limitations of § 1171.11(d). When making a request, you may specify a willingness to pay a greater or lesser amount.

(c) Where to send a request. (1) For NEH records (except NEH Office of the Inspector General records) and/or FCAH records, write to: The General Counsel, Office of the General Counsel, National Endowment for the Humanities, 1100 Pennsylvania Ave., N.W., Room 529, Washington, D.C. 20506. You may also send your request to the NEH General Counsel by facsimile at 202-606-8600, by e-mail at [gencounsel@neh.gov](mailto:gencounsel@neh.gov), or through the NEH's electronic FOIA request system, which is available on the NEH website at [www.neh.gov](http://www.neh.gov).

(2) For NEH Office of the Inspector General records, write to: The Inspector General, Office of the Inspector General, National Endowment for the Humanities, 1100 Pennsylvania Ave., N.W., Room 419, Washington, D.C. 20506. You may also send your request to the Inspector General by facsimile at 202-606-8329 or by e-mail at [oig@neh.gov](mailto:oig@neh.gov).

§ 1171.6 Responsibilities for processing and responding to requests.

(a) Processing requests. The NEH Office of the General Counsel (OGC) is the central office for processing requests for records, except when it's necessary for the NEH Office of Inspector General (OIG) to process a request to maintain the OIG's independence or ability to carry out its statutorily mandated duties. If the request is for OIG records, the NEH will inform the requester which office will be processing the request.

(b) Authority to grant or deny requests. The NEH General Counsel (or designee) is authorized to grant or deny requests for NEH records (excluding requests for OIG records), and/or FCAH records. The NEH Deputy Inspector General (or designee) is authorized to grant or deny requests for OIG records. The NEH General Counsel (or designee) is authorized to grant or deny requests on any fee matters and requests for expedited treatment, including OIG-related requests.

(c) Consultations and referrals. When the NEH receives a request for a record in its possession, the agency will determine whether another Federal government agency is better able to decide whether the record should or should not be disclosed under the FOIA. Ordinarily, the agency that originated a record will be presumed to be best able to determine whether to disclose it.

(1) If the NEH determines that it is the agency best able to process the record in response to the request, then it will do so, after consultation with the other agency that has a substantial interest in the requested records.

(2) If the NEH determines that it is not the agency best able to process the record, then it will refer the record (or portion thereof) to the other Federal agency, but only if that agency is subject to the FOIA.

(d) Notice of referral. Whenever the NEH refers all or any part of the responsibility for responding to a request to another agency, the NEH will notify the requester of the referral, provide the name of the agency to which the referral was directed, and include that agency's FOIA contact information. NEH will notify the requester of the part of the request that has been referred, unless such notification would disclose information otherwise exempt. If notification to the requester about the referral

would cause a harm meant to be protected against by the FOIA, NEH will coordinate with the agency rather than referring the records to it.

§ 1171.7 Timing of responses to requests.

(a) In general. The NEH customarily will respond to requests according to their order of receipt. In determining which records are responsive to a request, the NEH will include only those records in its possession as of the date it begins its search for records. If any other date is used, the NEH will inform the requester of that date.

(b) Timing for initial response. Ordinarily, the NEH will determine whether to grant or deny a request for records within twenty (20) days (weekends and Federal holidays excluded) of when the NEH receives a request.

(c) Tolling of time limits. The NEH may toll the 20-day time period to:

(1) Make one request for information it reasonably requests from the requester; or  
(2) Clarify the applicability or amount of any fees, if necessary, with the requester.

(3) Under paragraphs (c)(1) or (2) of this section, the tolling period ends upon the NEH's receipt of the information or clarification from the requester.

(d) Unusual circumstances. (1) When the NEH cannot meet the statutory time limits for processing a request because of unusual circumstances as defined in the FOIA, the NEH may extend the response time as follows:

(i) If the extension will be for ten (10) or fewer working days (i.e., weekends and Federal holidays excluded), the NEH will notify the requester as soon as practicable in writing of the unusual circumstances and the expected response date; and

(ii) If the extension will be for more than ten (10) working days, the NEH will provide the requester with an opportunity either to modify the request so that it may be processed within the time limit or to arrange an alternative time period to process the request or a modified request.

(2) If the NEH reasonably believes that multiple requests submitted by a requester, or a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances, and the requests involve clearly related matters, the NEH may aggregate the requests. The NEH will not aggregate multiple requests involving unrelated matters.

(e) Expedited processing. (1) The NEH will process requests and appeals on an expedited basis whenever it determines that they involve:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(ii) An urgency to inform the public about actual or alleged Federal government activity if the expedited processing request is made by a person primarily engaged in disseminating information.

(2) A requester may seek expedited processing at the time of the requester's initial request for records or at any later time.

(3) To request expedited processing, a requester must submit a statement, certified to be true and correct to the requester's best knowledge and belief, explaining in detail the basis for requesting expedited processing.

(4) Within ten (10) calendar days of receipt of a request for expedited processing, the NEH will decide whether to grant it and will notify the requester of the decision. If



the NEH grants a request for expedited processing, the NEH will place the request in the expedited processing track and then process the request as soon as practicable. If the NEH denies a request for expedited processing, the NEH will act upon any appeal of that decision expeditiously.

§ 1171.8 Responses to requests.

(a) Acknowledgment of requests. Upon receipt of a request that will take longer than ten (10) days to process, the NEH will send the requester an acknowledgment letter that assigns the request an individualized tracking number.

(b) Grants of requests. If the NEH makes a determination to grant a request in whole or in part, it will notify the requester in writing. The NEH will inform the requester of any applicable fees and will disclose records to the requester promptly on payment of any applicable fees. The NEH will mark or annotate records disclosed in part to show the amount of information deleted pursuant to a FOIA exemption, unless doing so would harm an interest protected by an applicable FOIA exemption. If technically feasible, the NEH will also indicate, on the agency record(s) it provides, the location of the information deleted.

(c) Denials of requests. If the NEH makes a determination to deny a request in any respect, the NEH will also notify the requester in writing of: (1) the name and title or position of the person responsible for the denial; (2) a brief statement of the reason(s) for the denial, including any FOIA exemption applied by the NEH in denying the request; (3) an estimate of the volume of records or information withheld, if applicable. This estimate need not be provided if the volume is otherwise indicated through deletion on the records disclosed in part, or if providing an estimate would harm an interest protected by an

applicable exemption; (4) a statement that the requester may appeal the denial under § 1171.10 and a description of the requirements to appeal.

§ 1171.9 Confidential commercial information.

(a) In general. The NEH will not disclose confidential commercial information in response to a FOIA request, except as described in this section.

(b) Definitions. For purposes of this section:

(1) Confidential commercial information means commercial or financial information obtained by the NEH from a submitter that may be protected from disclosure under Exemption 4 of the FOIA.

(2) Submitter means any person or entity from whom the NEH obtains confidential commercial information, directly or indirectly. The term includes corporations; state, local, and tribal governments; and foreign governments.

(c) Designation of confidential commercial information. A submitter of confidential commercial information will use good-faith efforts to designate by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire ten years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(d) When notice to submitters is required. (1) The NEH will give notice to a submitter whenever:

(i) The submitter, in good faith, has designated the requested information as information considered protected from disclosure under Exemption 4; or

(ii) The NEH has reason to believe that the information may be protected from disclosure under Exemption 4.

(2) The notice will either describe the confidential commercial information requested or include copies of the requested records or record portions containing the information. In cases involving a voluminous number of submitters, the NEH may make notice by posting or publishing the notice in a place reasonably likely to accomplish it.

(e) Exceptions to submitter notice requirements. The notice requirements of this section will not apply if:

(1) The NEH determines that the requested information is exempt under the FOIA;

(2) The information lawfully has been published or has been officially made available to the public;

(3) Disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous, except that, in such a case, the NEH will give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date.

(f) Opportunity to object to disclosure. (1) The NEH will specify a reasonable time period within which the submitter must respond to the notice described in paragraph (d)(2) of this section. If a submitter has any objection to disclosure, it must submit a detailed written statement to the NEH specifying all grounds for withholding any portion

of the information under any exemption of the FOIA. If the submitter relies on Exemption 4 as a basis of nondisclosure, the submitter must explain why the information constitutes a trade secret, or commercial or financial information that is privileged or confidential.

(2) The NEH will consider a submitter who fails to respond with the time period specified on the notice to have no objection to disclosure of the information. The NEH will not consider information it receives from a submitter after the date of any disclosure decision. Any information provided by a submitter under this section may itself be subject to disclosure under the FOIA.

(g) Notice of intent to disclose. The NEH will consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose confidential commercial information. Whenever the NEH decides to disclose confidential commercial information over the objection of a submitter, the NEH will provide the submitter written notice, which will include:

(1) A statement of the reason(s) why each of the submitter's disclosure objections was not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date, which will be a reasonable time after the notice.

(h) Notice of FOIA lawsuit. Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the NEH will promptly notify the submitter.

(i) Requester notification. The NEH will notify the requester whenever the NEH provides the submitter with notice and an opportunity to object to disclosure; whenever

the NEH notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

§ 1171.10 Administrative appeals.

(a) Appeals of denials. You may appeal a denial of your request for NEH records (except NEH OIG records) and/or FCAH records to The Deputy Chairman, National Endowment for the Humanities, 1100 Pennsylvania Ave., N.W., Room 503, Washington, D.C. 20506. You may also send your appeal to the NEH General Counsel by facsimile at 202-606-8600, by e-mail at [gencounsel@neh.gov](mailto:gencounsel@neh.gov), or through the NEH's electronic FOIA request system, which is available on the NEH website at [www.neh.gov](http://www.neh.gov). For a denial of your request for OIG records, you may appeal by facsimile at 202-606-8329, by e-mail at [oig@neh.gov](mailto:oig@neh.gov) or by mail to The Inspector General, National Endowment for the Humanities, 1100 Pennsylvania Ave., N.W., Room 419, Washington, D.C. 20506. Your appeal must be in writing and received by NEH within thirty (30) days of the date of the letter denying your request, in whole or in part (weekends and Federal holidays excluded). Your appeal letter must clearly identify the NEH decision that you are appealing and contain the tracking number, if assigned. You should clearly mark your appeal letter and envelope "Freedom of Information Act Appeal."

(b) Responses to appeals. The Deputy Chairman (or designee) or the Inspector General (or designee) will make a written determination on your appeal within twenty (20) days (weekends and Federal holidays excluded) after the agency receives your appeal, except as provided by 1171.7(d). If the appeal decision affirms the denial of your request, the NEH will notify you in writing of the reason(s) for the decision, including the applicable FOIA exemption(s), and inform you of the FOIA provisions for court review

of the decision. If the denial of your request is reversed or modified, in whole or in part, the NEH will reprocess your request in accordance with that appeal decision and notify you of that decision in writing. A response to an appeal will advise the requester that the 2007 amendments to FOIA created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. A requester may contact OGIS in any of the following ways: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road—OGIS, College Park, MD 20740; <https://ogis.archives.gov>; e-mail: [ogis@nara.gov](mailto:ogis@nara.gov); telephone: 202-741-5770; facsimile: 202-741-5769; toll-free: 1-877-684-6448.

(c) When appeal is required. If you wish to seek review by a court of any denial by the NEH, you must first submit a timely administrative appeal to the NEH.

§ 1171.11 Fees.

(a) In general. The NEH will assess fees for processing FOIA requests in accordance with this section and with the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget at 52 FR 10012 (Mar. 27, 1987). In order to resolve any fee issues that arise under this section, the NEH may contact a requester for additional information. The NEH ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(b) Definitions. For purposes of this section:

(1) Commercial use request means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit

interest, which can include furthering those interests through litigation. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because the NEH has reasonable cause to doubt a requester's stated use, the NEH will provide the requester a reasonable opportunity to submit further clarification.

(2) Direct costs means those expenses that an agency actually incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating duplication machinery. Not included in direct costs are overhead expenses such as the costs of space and heating or lighting of the facility in which the records are kept.

(3) Duplication means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records among others.

(4) Educational institution means any school that operates a program of scholarly research. A requester in this category must show that the request is authorized by and made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought to further scholarly research.

(5) Noncommercial scientific institution means an institution that is not operated on a "commercial" basis, as defined in paragraph (b)(1) above, and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. A requester in this category must show that

the request is authorized by and made under the auspices of a qualifying institution and that the records are not sought for a commercial use or to promote any particular product or industry, but are sought to further scientific research.

(6) Representative of the news media means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term “news” means information that is about current events or that would be of current interest to the public. Examples of news-media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only if such entities qualify as disseminators of “news”) who make their products available for purchase or by subscription or by free distribution to the general public. The NEH will regard “freelance” journalists as working for a news-media organization if they demonstrate a solid basis for expecting publication through that organization. A publication contract would provide the clearest evidence, but the NEH will also consider a requester’s past publication record in making this determination.

(7) Review means the process of examining a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review includes processing any record for disclosure, such as doing all that is necessary to redact it and prepare it for disclosure. It also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under §1171.9, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions. Review costs are recoverable even if the NEH ultimately does not disclose a record.



(8) Search means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records. The NEH will ensure that searches are done in the most efficient and least expensive manner reasonably possible.

(c) Fee schedule. In responding to FOIA requests, the NEH will charge the following fees for requests, subject to paragraphs (d), (e), and (f) of this section:

(1) Search. (i) The NEH will charge \$4.00 for each quarter hour spent by clerical personnel in searching for and retrieving a requested record. When clerical personnel cannot perform the search and retrieval (e.g. identification of records within scope of request requires professional personnel), the NEH will charge \$7.00 for each quarter hour of search time spent by professional personnel. Where the time of managerial personnel is required, the fee will be \$10.00 for each quarter hour of time spent by those personnel. The NEH may charge for time spent searching even if it does not locate any responsive records or if it determines that the records are entirely exempt from disclosure.

(ii) For computer searches of records, the NEH will charge the actual direct cost of conducting the search.

(2) Duplication. The fee for a photocopy of a record on one-side of an 8 1/2×11 inch sheet of paper is ten cents per page. For copies of records produced on tapes, disks, or other electronic media, the NEH will charge the direct costs of producing the copy, including operator time. For other forms of duplication, the NEH will charge the direct costs of that duplication. The NEH will honor a requester's preference for receiving a

record in a particular form or format where it is readily reproducible by the NEH in the form or format requested.

(3) Review. The NEH will charge review fees to requesters who make a commercial use request. Review fees will be charged only for the initial record review (i.e., the review the NEH conducted to determine whether an exemption applies to a particular record or record portion at the initial request stage). No charge will be made for review at the administrative appeal stage for exemptions applied at the initial review stage. However, if the NEH re-reviews the records for the applicability of other exemptions that it did not previously consider, then the costs for the subsequent review are assessable. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(i). The NEH may charge for review even if it ultimately decides not to disclose a record.

(d) Limitations on charging requesters. (1) Except for requesters seeking records for commercial use, the NEH will provide without charge:

- (i) The first 100 pages of duplication (or the cost equivalent); and
- (ii) The first two hours of search (or the cost equivalent).

(2) When, after first deducting the 100 pages (or its cost equivalent) and the first two hours of search, the total fee is \$25.00 or less for any request, the NEH will not charge a fee.

(3) When the NEH fails to comply with the time limits to which to respond to a request, and if no unusual or exceptional circumstances, as those terms are defined by FOIA, apply to the processing of the request, it may not charge search fees, or, in the

instance of requests from requesters defined in paragraphs (b)(4), (b)(5) and (b)(6) of this section, may not charge duplication fees.

(e) Categories of requesters. There are four categories of FOIA requesters: commercial use requesters; educational and non-commercial scientific institutions; representatives of the news media; and all other requesters. The NEH will assess fees for these categories of requesters as follows:

(1) Commercial use requesters. The NEH will charge the full direct costs for searching for, reviewing, and duplicating requested records.

(2) Educational and non-commercial scientific institution requesters. The NEH will charge for duplication only, excluding costs for the first 100 pages.

(3) News media requesters. The NEH will charge for duplication only, excluding costs for the first 100 pages.

(4) All other requesters. The NEH will charge requesters who do not fit into any of the categories above the full reasonable direct cost of searching for and reproducing records, excluding costs for the first 100 pages and the first two hours of search time.

(f) Requirements for fee waivers or reduction of fees. (1) The NEH will furnish responsive records without charge or at a reduced charge if it determines, based on all available information, that the requester has demonstrated that:

(i) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and

(ii) Disclosure of the information is not primarily in the commercial interest of the requester.

(2) To determine whether the first fee requirement is met, the NEH will consider the following factors:

(i) The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote or attenuated.

(ii) The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. Disclosure of information already in the public domain, in either duplicative or substantially identical form, is unlikely to contribute to such understanding where nothing new would be added to the public’s understanding.

(iii) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester’s expertise in the subject area as well as his or her ability and intention to effectively convey information to the public will be considered. It will ordinarily be presumed that a representative of the news media satisfies this consideration.

(iv) The public’s understanding of the subject in question must be enhanced by the disclosure to a significant extent. The NEH will make no value judgments about whether the information at issue is “important” enough to be made public.

(3) To determine whether the second fee waiver requirement is met, the NEH will consider the following factors:

(i) The NEH will identify any commercial interest of the requester, as defined in paragraph (b)(1) of this section, that would be furthered by the requested disclosure. Requesters will be given an opportunity to provide explanatory information regarding this consideration.

(ii) A fee waiver or reduction is justified where the public interest is greater than any identified commercial interest in disclosure

(4) Where only some of the requested records satisfy the requirements for a fee waiver, a waiver will be granted for those records.

(5) Requesters should make fee waiver or reduction requests when they first submit a FOIA request to the NEH. Fee waiver or reduction requests should address the factors listed in paragraphs (f)(2) and (3) of this section. Fee waiver or reduction requests may be submitted at a later time so long as the underlying record request is pending or on administrative appeal.

(g) Notice of anticipated fees in excess of \$25.00. (1) When the NEH determines or estimates that the fees to be charged under this section will exceed \$25.00, it will notify the requester of the actual or estimated fees, unless the requester has indicated a willingness to pay fees as high as those anticipated. If the NEH can only readily estimate a portion of the fees, it will advise the requester that the estimated fee may be only a portion of the total fee.

(2) The notice will offer the requester an opportunity to confer with NEH personnel in order to reformulate the request to meet the requester's needs at a lower cost and inform the requester of paragraph (d)(1) of this section, if applicable. A commitment by the requester to pay the anticipated fee must be in writing and must be received by the

NEH within thirty (30) calendar days from the date of notification of the fee estimate.

Until the requester agrees to pay the anticipated fee, the NEH will not consider the request as received by the agency and no further work will be done on the request. If a requester fails to respond within this timeframe, the NEH will administratively close the request.

(h) Charges for other services. When the NEH chooses, in its sole discretion, to provide a requested special service (e.g. certifying that records are true copies or sending them by other than ordinary mail), it will charge the direct costs of providing the service to the requester.

(i) Charging interest. The NEH may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. The NEH will assess interest charges at the rate provided in 31 U.S.C. 3717 and such charges will accrue from the billing date until the NEH receives payment from the requester. The NEH will follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97-365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(j) Advance payment. (1) For requests other than those described in paragraphs (j)(2) and (3) of this section, the NEH will not require the requester to make an advance payment before it commences or continues work on a request. Payment owed for work already completed (i.e., payment before copies are sent to a requester) is not an advance payment.

(2) When the NEH determines or estimates that a total fee to be charged under this section will be more than \$250.00, it may require the requester to make an advance

payment of an amount up to the amount of the entire anticipated fee before beginning to process the request, except where it receives a satisfactory assurance of full payment from a requester that has a history of prompt payment.

(3) When a requester has previously failed to pay a properly charged fee to the NEH within thirty (30) days of the billing date, the NEH may require the requester to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee, before the NEH begins to process a new request or continues to process a pending request from that requester.

(4) When there is an advance payment request, the NEH will not consider the request as received by the agency and no further work will be done on the request until the required payment is received. If the requester fails to respond within thirty (30) calendar days after the date of the advance payment request, the NEH will administratively close the request.

(k) Aggregating requests. When the NEH reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the NEH may aggregate those requests and charge accordingly. The NEH may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, the NEH will aggregate them only when there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. The NEH will not aggregate multiple requests involving unrelated matters.

§ 1171.12      Preservation of records.

NEH will preserve all correspondence pertaining to the requests that it receives as well as copies of all requested records, until disposition or destruction is authorized by the agency's General Records Schedule of the National Archives and Records Administration (NARA) or other NARA-approved records schedule. Records will not be disposed of while they are the subject of a pending request, appeal, or lawsuit under the Act.

§ 1171.13 Other rights and services.

Nothing in this part will be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

Michael P. McDonald

General Counsel.

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